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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

(Modoc)

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSHUA LEE BEATTEY,

Defendant and Appellant.

C079839

(Super. Ct. No. F14557)

A jury convicted defendant Joshua Lee Beattey of assault by means of force likely to cause great bodily injury (count 1), and battery resulting in great bodily injury (count 2). On both counts the jury found defendant personally used a deadly or dangerous weapon. The trial court sentenced defendant to seven years in prison, which included three years for the assault plus one year for the deadly weapon enhancement.

Defendant now contends the deadly weapon enhancement violates equal protection. Finding no merit in his contention, we will affirm the judgment.

BACKGROUND

Defendant came to the victim's house and hit the victim on the head with a club. The victim was hospitalized for two weeks and suffers permanent impairment.

The victim's girlfriend saw defendant drive up to the house. From inside the house she could see that defendant looked angry and that he was concealing something under his jacket. She tried to stop the victim from answering the door but heard him open the door, followed by a "bam." She went outside and saw the victim on all fours and defendant standing there holding a "bar." She got a good look at the bar when defendant raised it a bit; defendant then backed down the stairs saying, "He hit me first."

At trial, defendant admitted bringing the club to the house but maintained that he tucked it down the back of his pants and never hit the victim with it. He claimed the victim answered the door, shoved defendant, and defendant responded by punching the victim on the chin. According to defendant, the victim spun around and fell, hitting debris on the way down, causing his injuries. Defendant said the victim's girlfriend came outside and asked "Why did you do that?" and defendant replied "Because he hit me first." According to defendant, the girlfriend threw a mirror at him and grabbed a hammer; defendant backed away, reached behind his back and took out the club, saying: "You better put it down, and I'll put mine down." After he left he threw the club out of his truck window.

The victim did not recall seeing a club, but testified defendant came at him with an overhead swing before the "lights went out."

The jury convicted defendant of assault by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(4) -- count 1)¹ and battery resulting in great bodily injury (§ 243, subd. (d) -- count 2). In connection with count 1, the jury found

¹ Undesignated statutory references are to the Penal Code.

defendant personally inflicted great bodily injury (§ 12022.7) and personally used a deadly or dangerous weapon (§ 12022, subd. (b)(1)). Moreover, in connection with count 2, the jury found defendant personally used a deadly or dangerous weapon (§ 12022 subd. (b)(1)).

The trial court sentenced defendant to seven years in prison, consisting of the following: on count 1, a three-year middle term for assault, a three-year enhancement for inflicting great bodily injury, and a one-year enhancement for using a deadly or dangerous weapon; and on count two, a three-year middle term for battery and a one-year enhancement for using a deadly or dangerous weapon, all stayed pursuant to section 654.

DISCUSSION

Defendant contends the deadly weapon enhancement violates equal protection. He argues a defendant convicted of assault likely to produce great bodily injury under section 245, subdivision (a)(4), based on an assault with a deadly or dangerous weapon other than a firearm, is identically situated to a defendant convicted of assault with a deadly or dangerous weapon under section 245, subdivision (a)(1). Defendant notes, however, that a defendant convicted under subdivision (a)(4) may also receive a deadly or dangerous weapon enhancement, while the defendant convicted of subdivision (a)(1) may not, because a section 12022, subdivision (b)(1) deadly weapon enhancement may not be imposed where the use of a deadly weapon is an element of the offense. According to defendant, identically situated defendants are treated differently in violation of equal protection. We disagree.

A prosecutor may elect to charge the same conduct in different ways. (See *People v. Stewart* (2004) 119 Cal.App.4th 163, 173 [“The courts of this state have consistently held that differences in treatment of a criminal defendant based on prosecutorial discretion do not implicate equal protection”]; *People v. Chenze* (2002) 97 Cal.App.4th 521, 528 [“ ‘[i]t is axiomatic the Legislature may criminalize the same conduct in different ways. [Citations.]’ [Citation.] The prosecutor has discretion to proceed under

either of two statutes that proscribe the same conduct, but which prescribe different penalties”]; *People v. Wallace* (1985) 169 Cal.App.3d 406, 411 [“there is no equal-protection violation in vesting in the public prosecutor the discretion to charge a prior serious felony under one or the other of sections 667 or 667.5, subdivision (b)”].)

Although it is possible for a prosecutor to exercise discretion in a manner that violates equal protection (see, e.g., *People v. Owens* (1997) 59 Cal.App.4th 798, 801 [“the prosecution may not exercise discretion ‘deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification’ ”]), no such concerns are asserted in this appeal. Defendant’s equal protection challenge lacks merit.

DISPOSITION

The judgment is affirmed.

/S/
MAURO, J.

We concur:

/S/
HULL, Acting P. J.

/S/
BUTZ, J.